IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

EARLENE L. WILFONG,
A MARRIED WOMAN, INDIVIDUALLY,
Plaintiff/Appellant,

v.

TOWN OF PAYSON,
A MUNICIPALITY,
Defendant/Appellee.

No. 2 CA-CV 2018-0076
Filed December 17, 2018

Appeal from the Superior Court in Gila County
No. CV201700179
The Honorable Timothy Wright, Judge

AFFIRMED

COUNSEL

Jones Raczkowski PC, Phoenix
By Sara Siesco
Counsel for Plaintiff/Appellant

The Doyle Firm P.C., Phoenix
By William H. Doyle and Jonathan Y. Yu
Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Staring and Chief Judge Eckerstrom concurred.

B R E A R C L I F F E, Judge:

¶1 Earlene Wilfong appeals from the trial court's grant of summary judgment in favor of the Town of Payson dismissing her personal injury claim. We affirm.

Issues

¶2 Wilfong contends the trial court erred when it concluded that she fell in a location covered by A.R.S. § 33-1551, commonly known as Arizona's "recreational use" statute, and thus that her simple negligence claim was barred. The Town contends the court correctly dismissed Wilfong's complaint. The issues are whether the portion of the sidewalk on which Wilfong fell is a "premises" for the purposes of § 33-1551, and thus whether Wilfong's complaint was properly dismissed for her failure to allege that the Town was grossly negligent.

Factual and Procedural History

¶3 "We review *de novo* a grant of summary judgment, viewing the facts and reasonable inferences in the light most favorable to the non-prevailing party." *BMO Harris Bank, N.A. v. Wildwood Creek Ranch, LLC*, 236 Ariz. 363, ¶ 7 (2015). In August 2016, Wilfong tripped and fell on a cracked portion of sidewalk that is adjacent to the Green Valley Parkway in the Town of Payson. Both the sidewalk and the parkway run through Green Valley Park, and, at the point of her fall, the park land lies on both sides of the parkway. Wilfong sustained injuries to her head, face, teeth, ribs, and right hand. She filed a personal injury action against the Town, alleging it had notice the sidewalk was cracked and was negligent in maintaining the sidewalk as part of its general duty to maintain reasonably safe streets and sidewalks. The Town asserted, among other affirmative defenses, that Wilfong's complaint was barred by § 33-1551.

¶4 The Town thereafter filed a motion for summary judgment, arguing that the Town was immune from a simple negligence claim by

virtue of the recreational use statute, § 33-1551. In support of its motion, the Town submitted an affidavit asserting that the sidewalk on which Wilfong fell was within and part of Green Valley Park. It then argued that, because Wilfong was a recreational user and the sidewalk on which she fell was in a park, the Town could only be liable for her injuries if Wilfong alleged and proved that it was "grossly negligent." But, because Wilfong only pleaded a claim of "ordinary negligence" and there was no evidence of gross negligence, it argued, Wilfong's complaint should be dismissed.

¶5 Wilfong, in her opposition, argued that the sidewalk on which she fell, because it ran along and was adjacent to the Green Valley Parkway—a motor vehicle thoroughfare—was part of the parkway, not of the park. She pointed to the definition in the Town of Payson code of "street" as including its adjacent sidewalks. And, because sidewalks are not listed among the various recreational "premises" in § 33-1551, and, because not all roads, but only roads "not open to automotive use," are recreational premises under § 33-1551, the statute did not apply and the Town was not immune from her claim.

¶6 In its ruling granting the Town's motion, the trial court made a series of "factual findings for the purpose of ruling on the Motion," which appeared to have been facts undisputed in the parties' papers. It found both the parkway and the portion of sidewalk on which Wilfong fell were within the bounds of Green Valley Park. It also found the Town, prior to Wilfong's fall, had no notice the sidewalk was damaged. As for its legal determinations, the court concluded that, although the list of places considered "premises" in § 33-1551(C)(4) includes a "park" and "paved or unpaved multiuse trails and special purpose roads not open to automotive use," the list is "nonexclusive." The court concluded that the installation of a sidewalk as an improvement to the parkway did not change the "recreational character" of either the park or the sidewalk.[1] The sidewalk on which Wilfong fell, the court determined, was a recreational "'premises' as defined in A.R.S. § 33-1551."

¶7 Ultimately the trial court concluded that each of the conditions for conferring recreational immunity on the Town were met, and, because Wilfong's complaint contained "no allegations of wil[]ful,

[1] At oral argument in the trial court, Wilfong argued that the sidewalk was different in character from the path that went through the park, thus was not recreational in nature and not within the scope of the law.

malicious, or grossly negligent conduct," the Town was entitled to summary judgment and to a dismissal of Wilfong's claim. This appeal followed. We have jurisdiction pursuant to A.R.S. § 12-120.21(A)(1), A.R.S. § 12-120.21(B), and A.R.S. § 12-2101(A)(1).

Analysis

¶8 A trial court shall grant summary judgment "if the moving party shows that there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). We will affirm the entry of summary judgment if it is correct for any reason. *Sanchez v. Tucson Orthopaedic Institute, P.C.*, 220 Ariz. 37, ¶ 7 (App. 2008).

¶9 We review issues of statutory interpretation *de novo*. *BMO Harris Bank, N.A.*, 236 Ariz. 363, ¶ 7. "'Our primary goal in interpreting statutes is to effectuate the legislature's intent' as expressed in the statute's text." *Silver v. Pueblo Del Sol Water Co.*, 244 Ariz. 553, ¶ 22 (2018) (quoting *Rasor v. Nw. Hosp., LLC*, 243 Ariz. 160, ¶ 12 (2017)). "Words and phrases shall be construed according to the common and approved use of the language" but "[t]echnical words and phrases and those which have acquired a peculiar and appropriate meaning in the law shall be construed according to such peculiar and appropriate meaning." A.R.S. § 1-213. Because § 33-1551 limits common-law liability by conferring immunity, we must construe it strictly. *Armenta v. City of Casa Grande*, 205 Ariz. 367, ¶ 5 (App. 2003).

¶10 The recreational use statute provides "[a] public or private owner . . . of premises is not liable to a recreational . . . user except on a showing that the owner . . . was guilty of wilful, malicious or grossly negligent conduct that was a direct cause of the injury to the recreational . . . user." A.R.S. § 33-1551(A). Subsection (C)(4) of the law defines recreational "premises" as:

> agricultural, range, open space, park, flood control, mining, forest, water delivery, water drainage or railroad lands, and any other similar lands, wherever located, that are available to a recreational or educational user, including paved or unpaved multiuse trails and special purpose roads or trails not open to automotive use by the public and any building, improvement, fixture, water conveyance

> system, body of water, channel, canal or lateral, road, trail or structure on such lands.

A.R.S. § 33-1551(C)(4). The purpose of the law is "to encourage landowners to open certain lands to recreational users by limiting liability for injuries to those users." *Bledsoe v. Goodfarb*, 170 Ariz. 256, 258 (1991). Here, because the parties did not dispute that Wilfong was a "recreational user" when she fell, the issue is whether where she fell—the sidewalk along the Green Valley Parkway—is covered by the statute.

¶11 Wilfong first argues that the trial court erred in granting the Town summary judgment because sidewalks are not expressly listed as "premises" in A.R.S. § 33-1551(C)(4). The court found that the list of recreational premises in § 33-1551 is "nonexclusive" and the failure of the legislature therefore to specifically list "sidewalks" as covered recreational premises is not dispositive. We agree. Generally, "[a] statute which enumerates the subjects or things upon which it is to operate will be construed as excluding from its effect all those not especially mentioned." *Elfbrandt v. Russell*, 97 Ariz. 140, 144 (1966), *reversed on other grounds by Elfbrandt v. Russell*, 384 U.S. 11 (1966). Here, § 33-1551 includes not only types of properties—among them parks, open space, forests, mining lands, and roads not open for public automobile travel—but also man-made additions and improvements to such lands, among them paved trails, buildings, improvements, fixtures and water conveyance systems, roads, and structures. § 33-1551(C)(4). However, the plain language of § 33-1551 cannot be construed as excluding particular properties not specifically listed. Although the statute lists specific types of properties, it then adds the phrase "and any other similar lands, wherever located." This language renders non-exclusive what otherwise might have been an exclusive list of premises. *Cf. Doe ex. rel Doe v. State*, 200 Ariz. 174, ¶ 14 (2001) (because statute did not limit immunity to professions and occupations listed in Title 32, non-Title 32 professions and occupations are not excluded from the grant of immunity). Consequently, sidewalks generally are not facially excluded from the breadth of the statute.

¶12 Wilfong then argues that this particular sidewalk was part of the Green Valley Parkway, and not part of the Green Valley Park proper. Sidewalks, she contends, are part of the roads alongside which they run. And, because only roads "not open to automotive use by the public" are included as "premises" in the statute, this sidewalk, along a public motor vehicle thoroughfare, was expressly excluded from the ambit of the law. Wilfong cites to A.R.S. § 28-601(24) which defines, in a different context, "sidewalk" to mean "that *portion of the street* that is between the curb

lines . . . of a roadway and the adjacent property lines and that is intended for the use of pedestrians." A.R.S. § 28-601(24) (emphasis added). However, under § 33-1551, when a "road," whether for public automotive use or otherwise, is located "on" a property that meets the definition of recreational "premises," it is nonetheless a "road . . . on such lands" and is itself included as a recreational "premises." § 33-1551(C)(4). Even under Wilfong's argument, then, because the Green Valley Parkway bisects Green Valley Park, and parks are statutorily identified premises, the parkway and its sidewalk are thus themselves covered by the law.

¶13 Additionally, sidewalks are commonly referred to in Arizona law as "improvements." *See* A.R.S. § 33-992(E)(5) ("'improvement at the site' means . . . sidewalks"); A.R.S. § 9-463(8) (defines "improvements" as "pavement, shoulders, curbs, gutters, sidewalks, parking space, bridges and viaducts"); A.R.S. § 41-790(4) ("infrastructure" as " . . .improvements . . . such as . . . sidewalks and parking lots"). As such, here, given that the sidewalk is located within the park, it is an "improvement" "on" a recreational premises, and itself a recreational premises under the statute.[2] § 33-1551(C)(4).

¶14 As the trial court found, the sidewalk on which Wilfong fell qualifies as a recreational premises under § 33-1551. Consequently, the court was correct that the Town was entitled to recreational use immunity for any injury suffered by Wilfong, a recreational user. Avoiding recreational use immunity required Wilfong to allege and prove the Town had been wilfully, maliciously, or grossly negligent. Because she did not, the court also properly granted the Town summary judgment and dismissed her claim.

Disposition

¶15 We affirm the trial court's grant of summary judgment in favor of the Town of Payson and the dismissal of Wilfong's claim. We also

[2]A sidewalk is commonly defined as "[a] paved walkway on the side of a street." *The American Heritage Dictionary* 1628 (5th ed. 2011). Sidewalks are also generally for pedestrian travel, for recreational or other purposes, and not for motor vehicles. Even if this sidewalk were not an improvement on a recreational premises, it would arguably fit within the statutory language of "paved or unpaved multiuse trails . . . not open to automotive use by the public" and be subject to the statute. A.R.S. § 33-1551(C)(4).

award the Town costs incurred on appeal under A.R.S. § 12-342 upon its compliance with Rule 21, Ariz. R. Civ. App. P.